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# In the Supreme Court of the United States

OCTOBER TERM, 1989

DONALD L. GIBSON,
CORPORAL, UNITED STATES ARMY, PETITIONER

*v.*

THE UNITED STATES OF AMERICA, RESPONDENT

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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## QUESTION PRESENTED

WHETHER A PLEA BARGAIN THAT INTERFERED WITH THE TRIAL OF AN ACCOMPANYING CONTESTED CHARGE VIOLATED DUE PROCESS AND DENIED PETITIONER HIS SIXTH AMENDMENT RIGHT TO AN ADVERSARIAL PROCEEDING AND THE EFFECTIVE ASSISTANCE OF COUNSEL.

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No.

DONALD L. GIBSON,
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*v.*

THE UNITED STATES OF AMERICA, RESPONDENT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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The petitioner, Donald L. Gibson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

### OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 29 M.J. 379 (C.M.A. 1990) (Appendix A). The opinion of the Army Court of Military Review is reported at 27 M.J. 736 (A.C.M.R. 1988) (Appendix B).

### JURISDICTION

The judgment of the Court of Military Appeals was entered on February 13, 1990, affirming petitioner's conviction dated January 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. V 1987).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person shall . . . be deprived of life, liberty, or property, without due process of law."
>
> Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

## STATEMENT OF THE CASE

Petitioner pled guilty to sodomy of his 5-year-old son (Charge I) pursuant to a pretrial agreement (plea bargain) which provided that petitioner would:

> waive any and all evidentiary objections based on the Military Rules of Evidence to any pretrial statements made by my children, Donald L. Gibson, Jr., and Dana Gibson.

Record of Trial [hereinafter R.], Appellate Exhibit II. This agreement thus limited petitioner's ability to contest testimony introduced on findings with respect to the second charge, indecent acts with his 3-year-old daughter (Charge II) to which petitioner pled not guilty, as well as on sentencing for both offenses.[1]

[1] In return for the plea of guilty to Charge I, the convening authority agreed to suspend any confinement in excess of five years, for a period of two years from the date of release from confinement. All other lawful punishments could be approved. Petitioner was found guilty of both offenses and was sentenced to a dishonorable discharge, confinement for twenty years, forfeiture of $320.00 pay per month for twenty years, and reduction to Private E1. The sentence was approved, except confinement was suspended as provided for in the plea bargain. The courts below affirmed the findings and sentence.

During the guilty plea inquiry (R. 23-27) and the Government's presentation of evidence on the contested charge (R. 76-77), the military judge questioned counsel about the scope of the plea bargain provision limiting evidentiary objections. The detailed military defense counsel stated that he understood that the agreement barred any "objections under the Rules of Evidence, so it's pretty broad, Your Honor" (R. 77). In response, the military judge acknowledged that the agreement as worded was unenforceable; nevertheless, the military judge concluded with the following:

> Now, I'm perfectly well prepared to honor an agreement that says you're going to waive *confrontation* and *hearsay* objections . . . [but] you're free to make any other objections.

R. 77 (emphasis added). Despite the military judge's efforts to limit the scope of the agreement, defense counsel responded in an equivocal manner and withdrew a valid evidentiary objection stating:

> I want to make clear that if the Government feels that they want to rely on it [the evidence in question], I don't intend to make an evidentiary objection, okay. If they want to rely on it, I'll withdraw the objection.

R. 76. Defense counsel then summarized his attitude about his role in the trial when he said "I'm just – I'm treading" (R. 78).

The issue granted for review by the Court of Military Appeals was broader in scope but fully raised the constitutional questions presented herein:

> WHETHER [PETITIONER'S] PRETRIAL AGREEMENT WAS CONTRARY TO PUBLIC POLICY AND STATUTE AND WAS VOID, RENDERING THE FINDINGS AND SENTENCE INVALID.

The Court of Military Appeals held that "public policy does not require that the guilty pleas induced by this defense-originated provision be invalidated." *United States v. Gibson*, 29 M.J. 379, 382 (C.M.A. 1990).

## REASONS FOR GRANTING THE WRIT

Plea bargaining in the military justice system is pervasive. In fiscal year 1988, approximately seventy-five percent of the 2500 appellate cases involving Army personnel were guilty pleas at trial pursuant to pretrial agreements. Because guilty pleas are legitimized through a system that is "primarily an instrument of discipline, not justice," *O'Callahan v. Parker*, 395 U.S. 258, 266 (1969), any perceived abuse of the practice should warrant the attention of this Court.

Petitioner submits that a plea bargain in which he agreed to plead guilty to one charge cannot be used to impede his ability to contest another charge to which he pled not guilty. To allow a military accused to waive safeguards required by Congress would remove the procedural and constitutional protections that assure due process in the adversarial trial system. As in this case, an adversarial proceeding without "the Sixth Amendment right to counsel," cannot "protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 (1984).

Guilty pleas in the military are limited by Uniform Code of Military Justice article 45(a).[2] With respect to the plea bar-

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[2] 10 U.S.C. § 845(a) [hereinafter U.C.M.J.]. Article 45(a) states as follows:

> If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up a matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

The Court of Military Appeals has held that there was "considerable [congressional] concern expressed regarding the entry of guilty pleas in courts-martial." United States v. Chancelor, 16 U.S.C.M.A. 297, 36 C.M.R. 453 (1966). In response to this concern, the court later concluded that an accused must plead providently and must understand the meaning and effect of his plea. A provident plea can therefore only be obtained after the elements of the charged offenses have been explained to an accused as well as questioning an accused about what the accused had done to commit those offenses. Furthermore, the military judge must personally advise an

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gain or pretrial agreement that often forms the predicate for the plea, the President has proscribed terms or conditions that interfere with particular rights of the accused. These conditions are included in Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 705(c)(1)(B) [hereinafter R.C.M.].[3] Moreover, the entire court-martial process is protected by U.C.M.J. article 37(a) (prohibitions against unlawful command influence), article 54(a) (complete record of trial), and Rule for Courts-Martial 806(a) (public trials). The military trial process that exists today was intended, in guilty plea cases, to "give an added amount of protection to the innumerable cases where pleas of guilty are taken, particularly among the younger" soldiers. Uniform Code of Military Justice: Hearings on H.R. 2498 Before the Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 1054 (1949) (statement of Mr. Felix Larkin, Assist. General Counsel, Department of Defense).[4]

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accused of each constitutional right the entry of a guilty plea waives. United States v. Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247, 253 (1969). Subsequently, the Court of Military Appeals determined that article 45(a) also required military judges to explain any defenses that an accused's responses might suggest as well as obtain a factual basis for believing that the defense does not apply. United States v. Jemmings, 1 M.J. 414, 418 (C.M.A. 1976). Finally, the court also mandated that an inquiry must be conducted with respect to the terms of any pretrial plea bargain. United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976).

[3] The Rule provides in pertinent part: "A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: *the right to counsel*; *the right to due process*. . . ." (emphasis added).

[4] The eradication of unlawful command influence in the court martial process was one of the goals sought by Congress in drafting the U.C.M.J. in the early 1950s. Petitioner submits that the adversarial procedures embodied in the U.C.M.J. provide an insulating shield from the threat of command interference. Although petitioner does not claim that the provisions of this plea bargain were a product of some effort to deprive him of his constitutional right to counsel, petitioner does note that the opportunity to intrude upon adversarial process in an authoritarian environment like the military may unleash forces that have been heretofore held in submission.

Despite the efforts of both Congress and the President to ensure the procedural protections of an accused, the United States Court of Military Appeals has now evidenced a philosophy of *caveat emptor* in plea bargaining. As long as the bargained-for provision was an accused's idea, it will be upheld unless "its purpose and effect have . . . been shown to be barred by regulation or statute." *United States v. Gibson*, 29 M.J. at 382. In *United States v. Jones*, 23 M.J. 305, 308 (C.M.A. 1987), and *United States v. Zelenski*, 24 M.J. 1, 2 (C.M.A. 1987), the same court was willing to allow an accused to waive important procedural protections as long as the waiver appeared to be a "freely conceived defense product." *See also United States v. DeYoung*, 29 M.J. 78 (C.M.A. 1989).

The Court of Military Appeals has concluded that it is permissible to "relax" the approach to a plea bargaining process despite the fact that it occurs off the record and outside the light of a public proceeding. *Jones*, 23 M.J. at 308. Although such procedures may be commonplace throughout the fifty states and in the federal courts, Congress concluded that the same freedom of action could not be afforded in military prosecutions and therefore crafted an intricate process designed to limit the Government in its ability to obtain guilty pleas and influence findings of guilt outside of a full adversarial process. Since Congress intended that the prosecutorial forces of the military be controlled and on the record, a plea bargain negotiated off the record cannot be used as a vehicle to frustrate the free exercise of constitutional rights at trial, such as those afforded by the Sixth Amendment. "Government violates the right to effective assistance of counsel when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland*, 466 U.S. at 686. Petitioner submits that the Court of Military Appeals' decision in the instant cases sustains an interference with his constitutional rights and with recognized procedural safeguards.

Military courts have held that "[a] plea of guilty is . . . equivalent to a conviction." *United States v. Lucas*, 1

U.S.C.M.A. 19, 23, 1 C.M.R. 19, 23 (1951). As this Court noted long ago, in matters of military justice, the power of the Government should be limited to "the least possible power adequate to the end proposed." *Toth v. Quarles*, 350 U.S. 11, 22-23 (1955). Consistent with this, the Court of Military Appeals, in an opinion authored by Judge Homer Ferguson, eschewed expansive plea bargaining practices in the military in favor of limiting such agreements to only the plea and sentence. *United States v. Cummings*, 17 U.S.C.M.A. 376, 380, 38 C.M.R. 174, 178 (1968). Congress and the President never intended guilty pleas to interfere with the adversarial trial process. Therefore, because of the current willingness of the Court of Military Appeals to sanction an intrusion into the adversarial process, as in this case, it is appropriate for this Court to intercede.

## I. THE TERMS OF THIS PLEA BARGAIN DENIED PETITIONER HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AS WELL AS THE ADVERSARIAL PROCESS ENVISIONED BY THE SIXTH AMENDMENT.

The Sixth Amendment right to counsel is more than the mere presence of an attorney. The very "premise" that underlies the Sixth Amendment is the "right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984).

Particularly in the military, a meaningful adversarial process provides the most protection against unlawful convictions. Petitioner asserts that a plea bargain should not be allowed to influence the determination of guilt of a contested charge because *any* loosening of the adversarial protections embodied in the Sixth Amendment, whether conceived by the defense or not, will jeopardize an accused's right to due process.[5]

[5] Whether the Sixth Amendment actually applies to military courts-martial has not been squarely resolved. However, this Court has suggested (cont'd)

Even without the Sixth Amendment, Congress has erected a statutory framework which both creates an adversarial process and seeks to avert the risk of an unfair result in contested trial proceedings. Uniform Code of Military Justice articles 27(a)-(b) and 38(b)(1), and Rule for Courts-Martial 502(d)(6), demand that an accused be "represented" by counsel and that "counsel guard the interest of the accused zealously within the bounds of the law." *See United States v. Rivas*, 3 M.J. 282, 287 (C.M.A. 1977). Further, in military practice, article 38(b)(1) requires at least as much as is envisioned by the Sixth Amendment. *United States v. McGraner*, 13 M.J. 408, 414 (C.M.A. 1982); *United States v. Catt*, 1 M.J. 41, 48 (C.M.A. 1975); *see United States v. Hanson*, 24 M.J. 377, 379 (C.M.A. 1987).

Congress was concerned with the independence of the Judge Advocate General's Corps. That Congress intended the Corps itself to be somewhat autonomous is reflected in both U.C.M.J. articles 6(a) and 37(a). Congress also demanded that judge advocates be members of a bar and certified by The Judge Advocate General. U.C.M.J. article 27(b).[6] Clearly, these additional requirements, as well as the procedural requirements of the U.C.M.J., are evidence of the concern of Congress that military accused be given the *full* benefit of the adversarial process.[7]

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that in military "criminal prosecutions," the right would apply. Middendorf v. Henry, 425 U.S. 25, 33 (1976). Even if this Court should find that the Sixth Amendment is inapplicable, Congress and the President have created a scheme that demands no less than the full panoply of protections afforded under the Sixth Amendment.

[6] The continuing requirement of membership in a state or federal bar also means that the individual judge advocate can be held professionally accountable to someone other than military authorities. Congress also required judge advocates to be sworn to uphold their duties. U.C.M.J. art. 42(a). It should be noted that this oath is a supplemental requirement in that all officers are sworn to uphold the Constitution.

[7] Military accused are provided detailed military defense counsel. However, "[t]his Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it

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In a trial involving a guilty plea, Congress through U.C.M.J. article 45(a) and the United States Court of Military Appeals in the seminal case of *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969), and its progeny, have crafted a carefully controlled process to determine guilt outside of the protective coating of adversarial practice. As Congress deemed it necessary to establish a paternalistic climate in guilty plea proceedings, it must be assumed that Congress would wish to maintain the integrity of the adversarial process and disavow any procedure that might impede an accused's Sixth Amendment rights to adversarial testing.

Therefore, a plea bargain that diminishes the role of counsel impedes a right guaranteed to all criminal accused. In appellate practice, this Court has held that "[t]he constitutional requirement of substantial equality and fair process can only be obtained where counsel acts in the role of active advocate in behalf of his client as opposed to that of *amicus curiae*." *Anders v. California*, 386 U.S. 738, 744 (1967), *reh. denied*, 388 U.S. 924 (1967). The role of active advocate would seem to be no less demanding at trial.

Rule for Courts-Martial 705(c)(1)(B) prohibits a pretrial agreement from denying an accused his right to counsel. Petitioner's pretrial agreement, even as limited by the military judge to hearsay and confrontation objections, denied petitioner a meaningful representation by an advocate willing to undertake the adversarial testing of the Government's case as to the contested charge. The breakdown of the adversarial process in the instant case is apparent especially when one reviews the evidence which supported the findings of guilty to the contested charge (Charge II). The key witness

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must take steps to assure that the defendant has a fair opportunity to *present* his defense." Ake v. Oklahoma, 470 U.S. 68, 76 (1985) (emphasis added). Therefore, the Government must ensure that an accused, although provided legal representation, does not nevertheless lose the opportunity to present a fair defense.

for the prosecution was a child witness.[8] No physical evidence corroborated the victim's statement and her statements were bolstered by impermissible hearsay[9] and uncharged misconduct.[10] Furthermore, the child victim was asked leading ques-

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[8] The victim was only 3-years-old at the time of the offense and was four when she testified. It is apparent from the record that the victim had been prepared for trial (*i.e.*, coached) (R. 69-70). However, under the terms of the plea bargain, an objection could never be made because any concern about coaching by the prosecution or incompetence of the witness raised questions of confrontation which had already been waived.

[9] Defense counsel concluded that there was "[n]o significant tactical utility" to objecting to the use of the summarized pretrial testimony of a Government witness, who because of an illness at the last moment failed to appear at trial (R. 92, 95). Any argument asserting practicality is itself circular because the lack of "significant tactical utility" must be measured from the perspective of having already agreed to allow the Government to present its case unopposed. Noting the importance of cross-examination, the summarized testimony of this witness was allowed by counsel to be admitted to substantiate the allegations against petitioner without any opposition. As to hearsay, petitioner's wife was allowed to testify about the assault upon the victim (R. 74-76). The circumstances of these revelations did not qualify then as an excited utterance or as possessing the required degree of probativeness so as to overcome the need for other available evidence.

Another example of counsel's restricted performance was evident when the victim's mother was allowed to relate her daughter's alleged desire not to be left at home (R. 78). While defense counsel had agreed not to interpose any objections to hearsay evidence, he apparently was not precluded from asserting any other objections, such as one to suggest that the probative nature of this evidence was nonexistent. *See* Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 403. Finally, Staff Sergeant Finella White, an investigator with the Army Criminal Investigation Command (CID), related her recollections of the victim's version of the assault without objection (R. 89-90).

[10] Defense counsel's restricted role was most evident when he allowed the Government to present evidence of uncharged sexual misconduct that the Government did not intend to rely upon.

> DC: I want to make clear that if the government feels that they want to rely on it, I don't intend to make an evidentiary objection, as I agreed I wouldn't make an evidentiary objection, okay. If they want to rely on it, I'll withdraw that objection.

(cont'd)

tions without any predicate for such procedure or at least some token *voir dire* attempting to gain an insight with respect to the child's understanding of the truth. Finally, the entire procedure is dangerously suspect because the child victim was allowed to testify while "in the arms" of another principal accuser, her mother (*see* R. 63).[11]

The attitude of the defense counsel in this case was motivated out of concern for adhering to the pretrial agreement rather than concern for fully defending his client.[12] As this Court has previously noted, "[w]hile a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." *Cronic*, 466 U.S. at 657.

The plea bargain here impermissibly limited counsel's action and potential actions. The record can only demonstrate *some* of the specific issues that might have been waived. This Court is left to speculate as to what other trial strategies or issues were lost. Additional defense evidence or witnesses may have been presented by unrestrained counsel but for the pretrial agreement. Fifteen years ago, the United States Court of Military Appeals concluded that "extrajudicial in-

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MJ: Well, they don't, so . . .

DC: If they want to change their mind they can.

R. 76. The deferential nature of counsel seems hardly the adversarial testing envisioned by the framers of the Sixth Amendment.

[11] *Cf.* State v. Suka, 777 P.2d 240, 242-43 (Haw. 1989) (the presence of a child welfare worker on the stand with child complainant was impermissible bolstering); *but cf.* Baxter v. State, 522 N.E.2d 362, 365 (Ind. 1988) (however, in *Baxter*, the mother who held the child's hand had testified for the defendant denying that the sexual abuse had occurred).

[12] In reviewing counsel's conduct under a plea bargain, counsel's fidelity to his client is somewhat tempered. Counsel is inhibited in view of the danger of abrogating the agreement. These tensions should not exist in an adversarial proceeding. "Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest" (*Strickland*, 466 U.S. at 690), even where that conflict is between an accused's own interests. The plea bargain process should not be allowed to reach across into the adversarial arena.

fringement or interference with the trial and its procedures is forbidden" because such restrictions might hamper "defense counsel in his function of faithfully serving his client." *United States v. Holland*, 1 M.J. 58, 60 (C.M.A. 1975). Now, without full explanation, that same court concluded in petitioner's case that the plea bargain doing just that had no prejudicial effect upon the trial.

## II. THE PRETRIAL AGREEMENT IN THIS CASE WAS VOID AS CONTRARY TO PUBLIC POLICY BECAUSE PLEA BARGAINS ARE NOT DESIGNED TO ALLOW CIRCUMVENTION OF IMPORTANT CONSTITUTIONAL SAFEGUARDS IN VIOLATION OF AN ACCUSED'S RIGHT TO DUE PROCESS OF LAW.

Should this Court find that the Sixth Amendment is inapplicable to military prosecutions, the Fifth Amendment guarantees of due process can be relied upon to condemn the process employed in the instant case. *See Middendorf*, 425 U.S. 25, 34. Petitioner was denied substantial rights when the military judge applied the pretrial agreement in a manner which was contrary to the rules promulgated by the President. R.C.M. 705(c)(1)(b). Even if this Court were to focus only on the abridged version of the agreement, a provision to waive objections involving hearsay and confrontation strikes at the core of constitutional protections. Such terms are simply impermissible intrusions into the adversarial arena.

The waiver of "any and all objections" rendered both the Rules for Courts-Martial and the Military Rules of Evidence a nullity. Furthermore, these procedural deprivations were not confined to the trial on the merits but extended into the sentencing process as well. Any waiver of constitutional or statutory rights must be knowing and informed. However, given the dynamics of trial practice, petitioner submits that it is virtually impossible to countenance every nuance of a criminal proceeding. Unlike a stipulation of fact or confessional stipulation, petitioner cannot read and understand what is about to be waived. Therefore, the circumstances of

this plea bargain deprived petitioner of his rights to substantive due process because the risk of an unfair result was substantially increased.

The rule against hearsay is "based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact." *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973). Rights to confrontation are designed to prohibit "the practice of trying defendants on . . . *ex parte* affidavits or depositions . . . by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth.' " *United States v. McConnico*, 7 M.J. 302, 305 (C.M.A. 1979), (quoting *California v. Green*, 399 U.S. 149, 156 (1970); *Dutton v. Evans*, 400 U.S. 74, 89 (1970)).

Rule for Courts-Martial 705(c)(1)(B) was designed to guarantee against the waiver of the fundamental right to due process no matter how eager an accused appears to be. Bargaining, under this provision of the Manual for Courts-Martial, is simply not allowed, and, as a matter of procedural due process, it was error for the military judge in the instant case to enforce this provision of the pretrial agreement. Aside from Rule for Courts-Martial 705(c)(1)(B) prohibiting waiver of fundamental rights, the statutory framework contemplated by Congress suggests that the military judge should have disallowed the plea bargain as violative of petitioner's due process rights.

The lack of procedural due process was most evident in the nature of the proceeding after the pretrial agreement was in force. In effect, by limiting counsel's ability to effectively respond to the Government's case, the contested portion of petitioner's trial was nothing but a guilty plea without regard to the applicable procedural safeguards. *See* U.C.M.J. article 45(a); R.C.M. 910(c)-(f); *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).[13]

[13] Additionally, Rule for Courts-Martial 705(c)(1)(B) provides that an accused may not waive the right to "complete and effective" appellate review. In this regard, U.C.M.J. article 66(c) demands that courts of review "affirm only such findings of guilty and the sentence . . . as it finds correct in law (cont'd)

## CONCLUSION

In military practice, the demands of public policy require corrective action whenever the integrity of the court-martial process is at stake. As such, plea bargains should not be allowed to orchestrate trial proceedings into an empty ritual. *See United States v. Jones*, 23 M.J. 307 n.4; *United States v. Holland*, 1 M.J. 58 (C.M.A. 1975); *United States v. Cummings*, 17 U.S.C.M.A. 376, 38 C.M.R. 174 (1968); *United States v. Allen*, 8 U.S.C.M.A. 504, 25 C.M.R. 8 (1957).

The Court of Military Appeals' decision in this case represents a misapplication of constitutional law and the intent of Congress. It is not enough to say that this plea bargain was initiated by the defense or that petitioner felt that some of the terms of such were in his interests. Rule for Courts-Martial 705(c)(1)(B) and public policy eliminate con-

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and in fact." Military Rule of Evidence 103(a)(1) is fundamental to the ability of a court of military review to successfully accomplish its responsibility under article 66(c). Objections not preserved are waived. Otherwise, the courts of military review are reduced to a role of speculation, not judicial review. The pretrial agreement provision in question arguably deprives the appellate court of a complete record, and therefore interferes with the exercise of appellate review. Further, in addition to an incomplete record for appellate review, the court is provided a record replete with evidence lacking the basic guarantees of trustworthiness. This questionable evidence was not subject to meaningful challenge. As the Court of Military Appeals noted in United States v. Mills, 12 M.J. 1, 4 (C.M.A. 1981):

> In view of this Congressional solicitude for full appellate review of court-martial convictions, we cannot approve an agreement . . . which would *tend* to inhibit the exercise of appellate rights (emphasis added).

sideration of any such arguments. Petitioner (or in reality his counsel) should simply not be permitted in a plea bargain to negotiate away basic rights in favor of a beneficial sentence limitation. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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# APPENDICES

## APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

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No. 61,678
CM 8800401

UNITED STATES, APPELLEE

*v.*

DONALD L. GIBSON, CORPORAL, U.S. ARMY, APPELLANT

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Feb. 13, 1990

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### OPINION OF THE COURT

SULLIVAN, Judge:

During December 1987 and January 1988, appellant was tried by a general court-martial composed of a military judge sitting alone at Schofield Barracks, Hawaii. In accordance with his pleas, he was found guilty of forcible sodomy on his 5-year-old son, in violation of Article 125, Uniform Code of Military Justice, 10 USC § 925. Contrary to his pleas, he was found guilty of indecent acts with his 3-year-old daughter, in violation of Article 134, UCMJ, 10 USC § 934. He was sentenced to a dishonorable discharge, confinement for 20 years, forfeiture of $320.00 pay per month for 20 years, and reduction to the lowest enlisted grade. The convening authority, acting pursuant to a pretrial agreement, approved the sentence as adjudged but suspended confinement in excess of 5 years for a period of 2 years after appellant's release from confinement, with provision for automatic remission. The Court of Military Review affirmed the findings and sentence. 27 MJ 726 (1988).

This Court granted the following issue for review:

> WHETHER APPELLANT'S PRETRIAL AGREEMENT WAS CONTRARY TO PUBLIC POLICY AND STATUTE AND WAS VOID, RENDERING THE FINDINGS AND SENTENCE INVALID.

We hold that this agreement, as applied by the military judge, was neither invalid nor substantially prejudicial to appellant's rights. *United States v. Jones*, 23 MJ 305 (CMA 1987); Art. 59(a), UCMJ, 10 USC § 859(a).

Prior to trial, appellant agreed to plead guilty to attempted forcible sodomy on his son. However, he reserved the right to plead not guilty to the charge of committing forcible sodomy on his son and indecent acts with his daughter. The Government reserved the right to proceed on both original charges. Appellant's agreement also stated:

> I agree to waive any and all evidentiary objections based on the Military Rules of Evidence to any pretrial statements made by my children, [his son and daughter].

The military judge explained this provision to appellant in terms of its meaning and effect on the unresolved charges. He also assured himself that appellant proposed and voluntarily agreed to this provision.

Later in the trial, appellant amended his plea to guilty of forcible sodomy on his son. The Government then proceeded to prove the indecent-act offense. The mother of the victim was questioned by the prosecutor as follows:

> Q. Okay. Was there anything else that [D] told you about these incidents?
>
> A. Well, after she had first told me about it and I dried her off, we went into my bedroom.
>
> A. She told me the same story again, the exact same thing. And since we've been in Florida, right before we came over here, she told me that daddy had put a sock in her mouth and he took her into my room and she told me he had put his meat back there, she was pointing to her butt area.

DC: That gets into an area of uncharged misconduct at this point.

MJ: What's your position?

TC: I agree, sir, that is uncharged misconduct.

MJ: Well, I don't; he's charged with fondling her and placing his hands upon her private parts. It seems to me it falls within that. Now, if this is something the Government doesn't intend to rely on, fine, we won't deal with it. What's the case?

TC: The Government doesn't intend to rely on it, sir.

MJ: Okay, go ahead.

DC: I want to make clear that if the Government feels that they want to rely on it, I don't intend to make an evidentiary objection, as I agreed I wouldn't make an evidentiary objection, okay. If they want to rely on it, I'll withdraw that objection.

MJ: Well, they don't so . . .

DC: If they want to change their mind, they can.

MJ: What's the pretrial agreement; what exactly are the terms again?

DC: It basically says that I won't make any evidentiary objections to pretrial statements by the – well, any pretrial statements by the children or – to anybody. I was not – that allegation didn't come up until after the pretrial agreement.

MJ: Well, the intent of the thing was not to object – not to interpose hearsay or confrontation objections, correct?

DC: I believe it was stated as objections under the Rules of Evidence, so it's pretty broad, Your Honor.

MJ: *Well, I don't think such an agreement – an agreement that broad would be enforceable. If it's irrelevant, if it deals with uncharged misconduct, I think that you have to be free to object or we might as well not have a trial, which is the ultimate test of the acceptability of the terms of a pretrial agreement.*

DC: Yes, sir.

MJ: *Now, I'm perfectly well prepared to honor an agreement that says that you're going to waive confrontation and hearsay objections; that's what we went over, and you told me you had tactical reasons for that, and so on and so forth, but I don't think you're muzzled, and I want – I think you – the record needs to show that you understand that you're clear, you're free to make any other objections. Would you not agree?*

TC: Yes, sir, I agree with that.

MJ: Okay, fine. All right, that's prospective. You've been under no misapprehension up to now, I take it?

DC: No, sir, I have not. I'm just – I'm treading –

MJ: Yeah, I understand. Okay, good. Go right ahead, please.

(Emphasis added.)

The victim, appellant's 3-year-old daughter, testified at this court-martial that he engaged in indecent acts with her. Appellant's wife, a military police investigator, and a civilian social worker also testified that the victim told them on different occasions that her father had engaged in indecent acts with her. The defense had introduced in evidence a videotape interview of the victim by a social worker in which the former failed to confirm that her father had engaged in indecent acts with her. The defense also introduced testimony of the wife that the victim later said that her daddy had not hurt her.

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In *United States v. Jones*, 23 MJ 305, this Court addressed the propriety of including a waiver of certain pretrial motions as part of a defense proposed pretrial agreement. *See generally* RCM 705(c), Manual for Courts-Martial, United States, 1981.[1] The provision in Jones said:

> I also agree and understand that in addition to my plea as specified below, my defense counsel will not make any

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[1] (c) *Terms and conditions.*

(1) *Prohibited terms or conditions.*

(A) *Not voluntary.* A term or condition in a pretrial agreement shall

motions contesting the legality of any search and seizure out of which evidence against me may have been directly or indirectly obtained, or motions challenging any legality of any out-of-court identification.

In that case, although the accused pleaded guilty to all the charges against him, he might still have raised such motions

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not be enforced if the accused did not freely and voluntarily agree to it.

(B) *Deprivation of certain rights.* A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of posttrial and appellate rights.

**Discussion**

A pretrial agreement provision which prohibits the accused from making certain pretrial motions (*see* R.C.M. 905-907) may be improper.

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(2) *Permissible terms or conditions.* Subject to subsection (c)(1)(A) of this rule, subsection (c)(1)(B) of this rule does not prohibit an accused from offering the following additional conditions with an offer to plead guilty:

(A) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered;

(B) A promise to testify as a witness in the trial of another person;

**Discussion**

*See* R.C.M. 704(a)(2) concerning testimonial immunity. Only a general court-martial convening authority may grant immunity.

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(C) A promise to provide restitution;

(D) A promise to conform the accused's conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of the sentence, provided that the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement; and

(E) A promise to waive procedural requirements such as the Article 32 investigation, the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings.

and appealed their denial on a conditional basis. *United States v. Jones, supra* at 307 n.1; *cf.* RCM 910(a)(2). In appellant's case we have mixed pleas (*see* RCM 910(a)(1)) and a similar waiver provision which would additionally impact on the trial of a charge to which he pleaded not guilty. *Cf. United States v. Cummings*, 17 USCMA 376, 380, 38 CMR 174, 178 (1968).

Despite this distinction, review of the decision in *Jones* still suggests the standard by which the lawfulness of this provision can be measured. There, a majority of the Court held that an otherwise valid guilty plea will rarely, if ever, be invalidated on the basis of plea-agreement provisions proposed by the defense. *United States v. DeYoung*, 29 MJ 78, 81 (CMA 1989); *United States v. Zelenski*, 24 MJ 1 (CMA 1987). The rationale for this holding is that, absent government overreaching, it may be presumed that an accused and his counsel know what is fair to him and in "his best interest." *United States v. Jones, supra* at 308.

On the contrary, where the Government directly or indirectly proposes the terms, we have stated: "Only actions which may reasonably be construed as attempts to orchestrate the trial proceeding itself will be rebuffed." *Id.* at 307. As noted in footnote 4 of that opinion, the idea was to prevent *the Government* from turning the "trial proceedings into 'an empty ritual.' "

Turning to appellant's case, we note that he proposed the challenged plea-agreement provision. Moreover, its purpose and effect have not otherwise been shown to be barred by statute or regulation. Accordingly, public policy does not require that the guilty pleas induced by this defense-originated provision by invalidated. *See generally United States v. Papaleo*, 853 F.2d 16, 19 (1st Cir. 1988); *United States v. McGovern*, 822 F.2d 739, 743-44 (8th Cir.), *cert. denied*, 484 U.S. 956, 108 S.Ct. 352, 98 L.Ed.2d 377 (1987).

In any event, the military judge *sua sponte* construed this somewhat awkwardly-worded provision [2] in a narrow fashion.

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[2] This Court has in the past discouraged expansive plea-bargaining provisions. *See United States v. Dawson*, 10 MJ 142, 150 (CMA 1981) (Fletcher, J.); *United States v. Cummings*, 17 USCMA 376, 380, 38 CMR 174, 178 (1968).

He limited its application to confrontation and hearsay objections which appellant might make to evidence of out-of-court statements made by the victims.

We note, however, that the child victim involved in the only contested charge actually testified in this case (*cf. United States v. Quick*, 26 MJ 460 (CMA 1988)), and she was obviously available for cross-examination by the defense about her pretrial statements. In this context, possible objection on confrontation grounds to other government witnesses' testimony showing these same statements would be without merit. *United States v. Owens*, 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988). Moreover, hearsay objections would be questionable at best. *United States v. Lee*, 28 MJ 52, 54 (CMA 1989). *See also* Mil. R. Evid. 801(d)(1)(B), Manual, *supra*.

Finally, objections on any other grounds were simply not made despite the military judge's express invitation to defense counsel to do so. Accordingly, we hold that this provision as applied in this case did not substantially prejudice appellant. Art. (59); *cf. United States v. Dawson*, 10 MJ 142, 150 (CMA 1981).

The decision of the United States Army Court of Military Review is affirmed.

Judge COX concurs.

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EVERETT, Chief Judge (concurring in the result):

I

Charged with sodomy against his 5-year-old son and indecent acts against his 3-year-old daughter, Gibson offered to plead guilty to the former charges pursuant to a pretrial agreement. One term of that agreement was that he would "waive any and all evidentiary objections based on the Military Rules of Evidence to any pretrial statements made by my children, . . ."

This agreement on its face is quite broad; but Judge Wold, with commendable caution, construed it to embrace only hearsay and confrontation objections. In view of that limiting

construction, I doubt that Gibson would have been materially prejudiced even if this provision in the pretrial agreement were invalid. Any pretrial statement by the son that came into evidence before the findings concerned the offense to which appellant had pleaded guilty and as to which he had testified himself during the providence inquiry. The pretrial statements of his daughter concerned matters as to which she testified at trial. Moreover, although introduced as part of the Government's case-in-chief, these statements ultimately would have been admissible in rebuttal to corroborate his daughter's testimony in view of defense efforts to impeach her by prior inconsistent statements.

II

In any event, I see nothing wrong with the challenged provision of the pretrial agreement so long as it is construed as it was by the judge in this case.* As the majority opinion recognizes, this Court has given the defense broad leeway to propose provisions of a pretrial agreement. *See, e.g., United States v. DeYoung*, 29 MJ 78 (CMA 1989); *United States v. Zelenski*, 24 MJ 1 (CMA 1987); *United States v. Jones* 23 MJ 305 (CMA 1987); *United States v. Schaffer*, 12 MJ 425 (CMA 1982).

I should acknowledge, however, that these cases involved pretrial agreements where the terms of the agreement related only to the charges as to which the accused was pleading guilty. Here, on the other hand, although there was a guilty plea to one charge, the accused was pleading not guilty to another charge; and the pretrial agreement, at least in part, concerns the latter charge.

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* Obviously, I would prefer that the agreement be more specific about the objections being waived. For example, does the defense intend to waive objections that might be made under Mil.R.Evid. 404(b) or 403, Manual for Courts-Martial, United States, 1984? Moreover, if the parties have in mind specific pretrial statements, then in order to avoid confusion or surprise at trial, those statements should be specifically designated in the pretrial agreement.

Nonetheless, I see no problem in upholding such a provision. In *United States v. Bertelson*, 3 MJ 314 (CMA 1977), we upheld a "confessional stipulation" whereunder the accused stipulated to facts sufficient to authorize a finding of guilty as to the charge to which he pleaded not guilty. *See also United States v. Mills*, 12 MJ 1, 3 (CMA 1981). RCM 705(b), Manual for Courts-Matial, United States, 1984, specifically provides that "[a] pretrial agreement may include: (a) A promise by the accused to plead guilty to, *or to enter a confessional stipulation as to one or more charges and specifications . . .*" (Emphasis added.) If an accused can waive many of his most important safeguards by pleading guilty or entering into a confessional stipulation, I see no reason why he should not be free to enter into a stipulation whereunder he waives his right to have live testimony from some – or even all – of the government witnesses.

Often "we have referred to depositions and stipulations as possible substitutes for live testimony under the circumstances of a particular case." *United States v. Mills, supra* at 2-3. Where child witnesses are involved, it may be especially desirable to avoid the trauma of having them appear in court if in some other way the factfinder or sentencing authority can determine accurately what their live testimony would be. In a case like this, where his own children were the alleged victims, the accused himself may have been eager to avoid having the witnesses in court.

In view of the considerable opportunity allowed the defense to bargain for favorable consideration in return for a plea of guilty or a "confessional stipulation," there is no reason to preclude the defense from seeking concessions from the convening authority in return for a stipulation that will make it easier for the Government to present some of its evidence. *Cf. United States v. Mills, supra.* RCM 705(c)(1) prohibits terms of pretrial agreements which deprive an "accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of posttrial and appellate

rights." The agreement here did not deprive Gibson of his "right to counsel"; and, indeed, the waiver of evidentiary objections was entered with the full advice of counsel and for Gibson's own tactical advantage. Moreover, I perceive no deprivation of "due process" involved in this waiver of confrontation – although if Judge Wold had not construed the language of the agreement narrowly, perhaps some "due process" concerns might have been presented.

To the extent the pretrial statements of either child were considered by the judge in sentencing appellant, I see no deprivation of "the right to *complete* sentencing proceedings." (Emphasis added.) Both children testified during the trial – the daughter as to findings and the son as to sentence. "In many courts, sentencing is done largely on the basis of written evidence – chiefly in the form of a presentence report." *United States v. Mills*, 12 MJ at 2. Appellant can hardly complain that the pretrial statements of his children were before the court-martial for sentencing purposes – at least so long as they do not go beyond the bounds set by RCM 1001.

RCM 705(c)(2) states that

> subsection (c)(1)(B) of this rule does not prohibit an accused from entering the following additional conditions with an offer to plead guilty: (A) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered; . . . (E) a promise to waive procedural requirements such as the Article 32 investigation, the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings.

This language might be read to mean that such terms or conditions could only be agreed upon if there were "an offer to plead guilty." In that event, technically this case would fall within the letter of the rule – since there was "an offer to plead guilty" to one of the two charges against appellant; but

it would not be within the spirit of the rule if so construed. I do not, however, interpret the authorization of certain terms in connection with "an offer to plead guilty" as disapproval of such terms in a situation where an accused is pleading not guilty or is pleading guilty only as to a lesser-included offense.

In short, I believe that, whether he pleads guilty to all or some of the charges against him, or not guilty across the board, an accused has great leeway in proposing a pretrial agreement and the terms and conditions thereof. Apart from the specific prohibitions of RCM 705(c)(1), the principal limitations on pretrial agreements like those in the present case are that they emanate from the defense, *cf. United States v. Zelenski, supra*, and that the military judge assure that the accused fully understands what he is agreeing to. *Cf. United States v. Bertelson, supra*. Here those requirements were met, so I concur in the result.

## APPENDIX B

UNITED STATES ARMY COURT OF MILITARY REVIEW

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ACMR 8800401

UNITED STATES, APPELLEE

*v.*

CORPORAL DONALD L. GIBSON,
407-98-7248, UNITED STATES ARMY, APPELLANT.

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Nov. 30, 1988

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For Appellant: Lieutenant Colonel Joel D. Miller, JAGC, Major Marion E. Winter, JAGC, Captain William J. Kilgallin, JAGC (on brief).

For Appellee: Colonel Norman G. Cooper, JAGC, Major Daniel J. Dell'Orto, JAGC, Captain Martin D. Carpenter, JAGC, Captain Jody M. Prescott, JAGC (on brief).

Before HOLDAWAY, THORNOCK and CARMICHAEL, Appellate Military Judges.

### OPINION OF THE COURT

THORNOCK, Senior Judge:

The appellant was tried by a military judge sitting as a general court-martial convened by the commander of the 25th Infantry Division (Light) in Hawaii. Pursuant to a pretrial agreement allowing for mixed pleas, he pleaded guilty to forcible sodomy upon his five-year-old son in violation of Article 125, Uniform Code of Military Justice, 10 U.S.C.

§ 925 (1982) [hereinafter UCMJ], and not guilty to committing indecent acts upon his three-year-old daughter in violation of Article 135, UCMJ, 10 U.S.C. § 934 (1982).

He was convicted of the sodomy offense on his guilty plea. The government presented evidence on the indecent acts offense and he was found guilty of that offense as well. He was sentenced by the military judge to a dishonorable discharge, confinement for twenty years, forfeiture of $320.00 pay per month for twenty years, and reduction to Private E-1. In accordance with a pretrial agreement, the convening authority approved the sentence, but suspended the confinement in excess of five years for a period of two years from the date of the appellant's release from confinement with a provision for automatic remission.

The facts of this case are not in dispute. The appellant assigns as error that the pretrial agreement was contrary to both public policy and statute and is therefore void, rendering the findings and sentence invalid. We disagree and affirm.

The operative assertions by the appellant center on a somewhat unusual pretrial agreement. The agreement had two distinctive features. First, it provided for mixed-pleas without the requirement of a stipulation of fact and allowed the government to present evidence on the not guilty plea. Secondly, it provided that the appellant would "waive any and all evidentiary objections based on the Military Rules of Evidence to any pretrial statements made by my children, [D] and [D]." (Appellate Exhibit II.) The record does not reveal the negotiations of the parties concerning the mixed-plea portion of the agreement, except as to the clear assertion that the agreement originated with defense. Mixed-plea and waiver pretrial agreements are not the norm, but obviously they can serve useful purposes in judicial economy, as well as protecting provident guilty pleas and strengthening accused's negotiation positions.

In the case *sub judice*, it is clear that there was a mutual benefit derived by the defense-initiated provision of waiver.

It removed impediments to the government's presentation of credible evidence by children of tender years who had been victimized by their father. It eased further emotional travail to the victims and their family, including no doubt their father, and it provided the appellant a sentence limitation that was far less than the maximum. The wisdom of both sides of the bargain was amply shown at trial by the testimony of the victims and the conduct of counsel, as well as by the convening authority's reduction of the appellant's sentence by fifteen years after the trial. Under the circumstances of this case, public policy most certainly was vindicated rather than violated. *See United States v. Jones*, 23 M.J. 305 (C.M.A. 1987) (military judge should establish on the record that provision in a pretrial agreement in which accused waives certain rights voluntarily originated with accused).

Both *Jones* and *United States v. Holland*, 1 M.J. 58 (C.M.A. 1975), loudly sound caution to all parts of the military justice system that pretrial agreements which forego or waive procedures or matters that benefit an accused will be scrutinized for propriety. Further, it is mandated military law that the pretrial agreement must be a "freely conceived defense product," *Jones*, 23 M.J. at 306, and "attempts to orchestrate the trial proceeding itself will be rebuffed." *Id.* at 307 (citing *Holland*). *See also United States v. Zelenski*, 24 M.J. 1 (C.M.A. 1987) (Guility plea not invalidated where pretrial agreement with provision waiving trial by court-martial composed of members where provision was freely conceived defense product.); *United States v. Green*, 1 M.J. 453 (C.M.A. 1976) (Military judge must ascertain, *inter alia*, that an accused understands the meaning and effect of each condition of a pretrial agreement.); and *United States v. Allen*, 25 C.M.R. 8 (C.M.A. 1957) (The pretrial agreement cannot transform the trial into an empty ritual.). In the instant case, all required conditions were satisfied. The military judge made a careful initial providence inquiry, noted the waiver

provision and ruled that it was providently made.[1] In part, the inquiry included the following:

> MJ: Okay. Now this agreement says that in addition to your plea of guilty, the pleas that you have already entered, you will waive any evidentiary objections to the admission into evidence of pretrial statements made by either [D], or [D], your children. Now first of all, do you understand what I just said?
>
> ACC: Yes, sir.
>
> MJ: You see, we have rules about what can be considered in a trial by court-martial; these are rules of evidence, and those rules say that some things can't be considered. And it may be that those rules will say that some of the things or all of the things that your children might say or might have said to other people would not be admissible, could not be considered as evidence against you in your trial. Do you understand that?
>
> ACC: Yes, sir.
>
> MJ: What this says is that you're going to give up any argument or contention that that is so, and you're going to basically allow the government to introduce any statements made by your children, either in court or previously. Do you understand that?
>
> CC: Yes, sir.
>
> MJ: Now, you would be giving up the right to make those objections; you'd probably be giving up the right to confront the witnesses against you. And this would not only pertain to the offense to which you've plead guilty, but to the other offenses with which you're charged . . . Do you understand that?
>
> ACC: Yes, sir.

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[1] The judge's inquiry concerning the waiver provision alone takes nearly five pages of the record.

MJ: Now, do you understand that you would be giving up the right to keep out any statements either of those children have made about any offenses of this nature, whether such statements were made in court or out of court; at the time of your trial or previously?

ACC: Yes, sir.

MJ: Is that clear to you?

ACC: Yes, sir.

MJ: All right. Now that's what this waiver means. All of that comes in, and may not only be considered with respect to the offense to which you've plead guilty today, but may also be considered as evidence against you concerning these other offenses with which you're charged. Do you understand all that?

ACC: Yes, sir.

MJ: Is that what you meant to have happen as part of this agreement?

ACC: Yes, sir.

The judge also made certain that the pretrial agreement was "a freely conceived defense product" and no impermissible attempts to "orchestrate" the trial occurred as follows:

MJ: All right. Now how did this come about; who started all of this?

ACC: My defense counsel brought it up, sir, in talking to me. I thought about it and everything and I told him that's what I wanted, sir.

MJ: Okay. Now, usually in a situation like this where the defense offers something like this, it's because you think that in the long run you'll be better off by giving up one thing in order to get something else; that it'll be to your benefit. Is that the way you look at this?

ACC: Yes, sir . . .

MJ: All right. Can you confirm all of that, Major [F]?

DC: Yes, sir, this was a product of my mind. I proposed it first to my client before I even went to the government with it. The government never approached me about this. We never discussed it until after I initially had brought the subject to the government.

MJ: I gather you're convinced that your client will be better off if he gives up his right to contest this evidence in exchange for the sentence limitation?

DC: Yes, sir, I am.

MJ: Do you understand that this may bring about a conviction for very serious offenses that might not otherwise be reached?

DC: Yes sir, I am, and I've discussed that with my client.

MJ: Okay. Your professional judgment is that this is the best course of action for your client, all things considered, then?

DC: Yes, sir; we thought about it for a long time and we discussed it on quite a few occasions.

MJ: Okay, all right. And you're also willing to assure me that the government had no hand in the genesis of this agreement?

TC: Yes, sir, that's true.

During the course of the contested portion of the trial, the military judge and counsel had occasion to readdress the waiver provision when an evidentiary objection was made by the defense concerning uncharged misconduct. The military judge again pursued the intent of the waiver and the origin of the provision.

On the record, the military judge also clearly limited the effect of the waiver provisions to confrontation and hearsay objections to statements of the appellant's children. Further, he satisfied himself that the defense was not "muzzled" and was free to make any other objections. Both the defense and government acceded to that understanding. Under the circumstances of this case, it is clear that the defense made tactical pretrial decisions for the accused's benefit. There was no impermissible attempt to "orchestrate the trial proceedings," and the pretrial agreement waiver provision meets all legal requirements. Thus, the assignment of error is without merit.

On the consideration of the entire record, we hold the findings of guilty and the sentence as approved by the conven-

ing authority correct in law and fact. Accordingly, the findings of guilty and the sentence are affirmed.

Chief Judge HOLDAWAY and Judge CARMICHAEL concur.

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